FILE COPY

FILED
JUN 15 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 91

UNITED STATES OF AMERICA,

Appellant,

against

ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC., BROWN EQUIPMENT AND MANUFACTURING CO., and DAVE BECK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

CHARLES SELIGSON
Counsel for Fruehauf Trailer Co., Appellee
350 Fifth Avenue
New York 1, New York

Of Counsel:

ALBERT L. SCHMALHOLZ
MELVIN LLOYD ROBBINS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Appellant*, —*against*— ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC., BROWN EQUIPMENT AND MANUFACTURING CO., and DAVE BECK, *Appellees*.	No. 941

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellee Fruehauf Trailer Co., pursuant to Rule 16 of the Revised Rules of this Court, moves that the final judgment of the District Court be affirmed on the ground that it is manifest that the question on which the decision of this cause depends is so unsubstantial as not to need further argument.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTION PRESENTED

The question presented is whether a loan of money in 1954 by an employer, in an industry affecting commerce, to a representative of his employees, intending repayment of said money with interest, falls within the proscription of Section 302(a), (b) of the Labor Management Relations Act of 1947.[1]

STATUTES INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U. S. C. § 186, provided, in part, as follows:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.
>
> * * *
>
> (d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment of not more than one year, or both.
>
> * * * * *

---

[1]This statement of the question differs from the statement of the question posed in the Notice of Appeal in two respects, namely: (1) the Notice uses the term "payment of money" instead of "loan of money"; and, (2) this statement adds the year of the transaction (i.e., "in 1954").

On September 14, 1959, Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, amended Section 302, *supra*, to read, in part, as follows:

(a) It shall be unlawful for any employer *or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer* to pay, *lend*, or deliver, or agree to pay, *lend*, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; * * *.

(b)(1) It shall be unlawful for any *person* to *request, demand*, receive, or accept, or agree to receive or accept, any payment, *loan*, or delivery of any money or other thing of value *prohibited by subsection (a)*.[2]

* * * * *

STATEMENT

This is a direct appeal from the final judgment entered on February 18, 1960 by the United States District Court for the Southern District of New York dismissing the indictment[3] as against all the defendants. The indictment was returned on June 17, 1959.

---

[2]Italics indicate new material.

[3]Count I of the indictment reads as follows:

"On or about the 21st day of June, 1954, in the Southern District of New York, ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC. and BROWN EQUIPMENT AND MANUFACTURING CO., defendants, employers of employees who were engaged in an industry affecting commerce, did unlawfully, wilfully and knowingly pay and deliver and agree to pay and deliver to DAVE BECK, President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a representative of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000."

Count I of said indictment charged that in June 1954, the employer-defendants paid and delivered to a representative of their employees (Dave Beck) a thing of value, to wit, money in the amount of $200,000, in violation of Section 302(a), (d). Count II charged the defendant-representative (Dave Beck) with having received the money in violation of Section 302(b), (d).

On February 18, 1960, the case came on for trial before the Honorable Sidney Sugarman, United States District Judge. Prior to empaneling a jury the District Court read into the record extracts from the government's pre-trial memorandum, and ruled that said extracts constituted judicial admission of fact (R 6 et seq.). Thereafter, on oral motion of defendants, the indictment was dismissed as to all defendants.

The government charged that in 1954 defendant-employers paid or delivered money to the defendant-representative. Despite this charge, the government's pre-trial memorandum, submitted to the District Court, acknowledged that the transaction was a loan at interest, and that the loan had been repaid in 1955 by the defendant-representative. The District Court ruled that, since the transaction was a loan, it was not encompassed or proscribed by Section 302(a), (b). The defendants' motions to dismiss were thereupon granted. Direct appeal was taken to this Court by the government pursuant to 18 U. S. C. § 3731.

ARGUMENT

The question presented is so unsubstantial that the judgment below should be affirmed without full hearing.

Appellee urges summary affirmance for two reasons. First, prerequisite to full consideration by this Court, a question must have "substance"—meaning importance to

the public, and not merely importance to the parties alone. Five years after the transaction alleged in the indictment, Section 302 was amended to prohibit loans in express terms. The construction of the old statute now has no public importance and no "substance".

Second, the 1947 version of the statute (Section 302) did not expressly prohibit loans; and in the absence of express language, there was no prohibition of loans. Section 302 is *malum prohibitum*: a *malum prohibitum* statute must clearly prohibit an act in order to make that act illegal. At the very least, Section 302 did not state that loans were prohibited in terms which gave fair warning to the community. Moreover, the legislative history of the 1947 version of Section 302, like the language of the statute, shows no intention by Congress to prohibit loans.

1. The construction of Section 302, as originally enacted in 1947, has no public significance, and this appeal should not be permitted to take up the time of this Court.

This Court has repeatedly emphasized to the Bar that it carries a tremendous work-load and can afford to devote its time to full-dress hearings of only those cases which have importance to the entire community and not merely importance to the particular parties alone.[4] Rule 16(1)(c) of this Court contemplates a summary disposition of "unsubstantial" questions, notwithstanding a statutory right of appeal, where the question presented is simply not worthy of full-dress argument at the expense of other applications for full review.[5] In this respect, the considerations governing motions to dismiss or affirm under Rule 16 are effectually the same as the considerations governing review on

---

[4]See Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U. S. 70, 75 S. Ct. 614, 99 L. ed. 897 (1955).

[5]See Del Pozo y Marcos v. Wilson Cypress Co., 269 U. S. 82, 46 S. Ct. 57, 70 L. ed. 172 (1925).

certiorari under Rule 19.[6] The threshold issue should be, Does the question presented have "substance"? That is, are there special and important reasons, in the exercise of sound judicial discretion, for the Court to place the matter on its calendar?

The only possible importance of this appeal is in regard to loans made by "employers" to "representatives" prior to September 14, 1959, yet within the five-year statute of limitations (18 U. S. C. § 3282). The rarity of those loan transactions can be seen from the fact that the case at bar and one other case[7] are the only two pending cases "known" to the government (Jurisdictional Statement, p. 6). Diligent search has disclosed no other criminal cases, reported or unreported, involving loans under Section 302, despite the fact that thirteen years have elapsed since its enactment in 1947. It seems reasonable to predict that few, if any, additional cases involving loans will "develop" under the 1947 version of Section 302.

Literally hundreds of appeals and petitions for certiorari are presented to this Court annually. The construction of a statutory provision already declared by Congress to be inadequate,[8] and already amended by Congress to remedy the inadequacy, surely has no claim to the work-load of this Court.

2. Section 302, as originally enacted in 1947, failed to give fair notice to the community that a genuine loan was proscribed.

The Courts have ruled that Section 302 is *malum prohibitum* and not *malum in se*, and that criminal intent is im-

---

[6]See STERN & GRESSMAN, *Supreme Court Practice* (2d Ed., BNA, 1954), pp. 237, 250-253.

[7]United States v. Golden, Cr. No. 32479, U. S. D. C., N. D. N. Y., decided Dec. 24, 1959, per Brennan, J. (See Jurisdictional Statement, p. 6, fn. 2.)

[8]See discussion *infra*.

material.[9] It is ancient law that criminal statutes and especially provisions *malum prohibitum*, are to be strictly construed in favor of the defendants indicted thereunder. Statutory prohibition of conduct must be clear and unambiguous; otherwise, the conduct is not criminal, and an indictment under an unclear and ambiguous statute with respect to such conduct must be dismissed. In construing such a criminal statute, the Court must inquire whether that statute gives fair warning to the community of what the legislature intends to prohibit and penalize, and whether that warning is expressed in language that the average citizen in the community can reasonably understand. The warning must be explicit in the statute and not concealed in the mind of the draftsman. As stated by Mr. Justice Holmes in McBoyle v. United States, 283 U. S. 25, 51 S. Ct. 340, 75 L. ed. 816 (1930):

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a *fair warning* should be given to the world *in language that the common world will understand*, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used. [Case.]" 283 U. S. at 27 (emphasis supplied).

---

[9] United States v. Ryan, 232 F. 2d 481 (2d Cir. 1956), on remand from 350 U. S. 299, 76 S. Ct. 400, 100 L. ed. 335 (1955); Brennan v. United States, 240 F. 2d 253 (8th Cir. 1956), cert. den. 353 U. S. 931, 77 S. Ct. 716, 1 L. ed. 2d 724 (1957); Korholz v. United States, 269 F. 2d 897 (10th Cir. 1959), cert. den. 361 U. S. 929, 80 S. Ct. 367, 4 L. ed. 2d 352 (1960)

This Court has had occasion recently to explain and emphasize the policy underlying the requirement that *malum prohibitum* statutes be strictly construed in favor of defendants. Ordinarily, our system of law requires that crimes involve the element of *mens rea* or criminal intent.[10] Nevertheless, Congress may omit *mens rea* from crimes created to enforce federal regulations, such as the regulations of interstate commerce under Section 302. No matter how multifarious those regulatory crimes may be: so long as they omit the element of criminal intent, they are exceptional. If criminal penalties are to be imposed without any element of criminal intent, then the statutes must at least prohibit the newly punishable conduct in absolutely clear terms. As stated by Mr. Justice Jackson, in Morissette v. United States:[11]

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. * * *" 342 U. S. at 250.
>
> "* * * Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. * * *" 342 U. S. at 256.
>
> "The Government asks us by a feat of construction radically to change the weights and balances in

[10]See Smith v. California, U. S. , 80 S. Ct. , 4 L. ed. 2d 205 (1959); Lambert v. California, 355 U. S. 225, 78 S. Ct. 240, 2 L. ed. 2d 228 (1957); Morissette v. United States, 342 U. S. 246, 72 S. Ct. 240, 96 L. ed. 288 (1952).

[11]Note 10, *supra*.

> the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative." 342 U. S. at 263.

There is no element of *mens rea* in Section 302. Yet the 1947 version of Section 302 contained no language giving fair warning to the defendants that a loan was to be a crime in 1954. Our system of law simply will not tolerate a criminal conviction for a genuine loan under the old Section 302.

3. When Congress has prohibited loan transactions in *malum prohibitum* statutes, Congress has done so explicitly. The absence of such explicit prohibition in Section 302 is manifest upon comparison with 18 U. S. C. §§ 217 and 218. The District Court's interpretation of Section 302 can have no adverse effect upon Chapter 11 (Bribery and Graft) of the federal Criminal Code. Most of those sections are ***malum in se***. By contrast, Section 302 and Sections 217 and 218 are *malum prohibitum*.

In an attempt to establish the "substance" of this appeal, the government warns that the District Court's interpretation of Section 302 may affect the meaning of the federal bribery statutes. The government notes a similarity of language in Section 302 and in 18 U. S. C. §§ 201, 202, 204-216, 219, 220.[12] At most, the similarity is superficial.

[12] Jurisdictional Statement, pp. 6-7. The other statutes cited by the government and claimed to contain language similar to § 302 (Jurisdictional Statement, pp. 6-7) include 18 U. S. C. §§ 912, 915, 1025 (false pretenses, false personation); 18 U. S. C. § 873 (blackmail);

It is significant that the government deliberately omits reference to 18 U. S. C. §§ 217, 218. Even a cursory comparison of the language of these statutes compels the conclusion that Congress did not intend to include a genuine loan in Section 302. That is precisely the reason for the dismissal of the indictment by the Court below.

The bribery statutes cited by the government deal with gifts, bribes and graft to federal officers and employees, and they omit the word "loan". However, each of those statutes contains a statement to the effect that the offer, promise or gift of any money or other thing of value must be made *with intent to influence the decision or action of the recipient on a question* before him in his official capacity. Significantly, the only two sections in the series from 18 U. S. C. § 201 through § 220 using the word "loan" and penalizing such a transaction, are Sections 217 and 218. The latter sections refer to transactions with bank examiners, and provide that any bank officer who grants any *loan or* gratuity to a bank examiner, commits a crime. Sections 217 and 218 contain no language similar to "with intent to influence his decision or action on any question".

The broad language of Sections 201 and 202 and the other sections of the Bribery Chapter of the Criminal Code cited by the government, focus on "intent to influence". It is immaterial to the question presented whether the language of those bribery statutes would support an indictment and conviction for an illegitimate loan transaction; for *no* transaction would be criminal, as bribery, unless the parties had engaged in that transaction with specific criminal intent. On the other hand, and by sharp contrast, where Congress has intended to prohibit loans without regard to "intent to influence", Congress has done so—and said so—in precise

---

18 U. S. C. §§ 875(b), (d), 876, 877 (extortion). It is inconceivable that a loan transaction could even be regarded as an element of any of those crimes.

terms, as in Sections 217 and 218, and in the 1959 version of Section 302.

The legislative histories of both Section 302 and the Bribery Chapter of the Criminal Code, clearly demonstrate the foregoing.

First of all, the entire Criminal Code was in process of re-definition and re-codification by the 79th Congress—the same Congress which enacted the Taft-Hartley Act—during the session when Section 302 was enacted. The word "loan" was included in the 1948 version of Sections 217 and 218; yet, the word "loan" was omitted from the 1947 version of Section 302.

Secondly, in 1959, when Congress did undertake to amplify and re-codify the Labor Management Relations Act of 1947 ("Taft-Hartley Act"), the resulting statute—the Labor Management Reporting and Disclosure Act of 1959 ("Landrum-Griffin Act")—expressly prohibited loans in addition to outright payments. Section 302 *now* reads:

> "(a) It shall be unlawful for any employer * * * to pay, *lend*, or deliver, or agree to pay, *lend*, or deliver, any money or other thing of value—* * *." (Emphasis supplied.)

What is of critical importance here, is that Sections 201 and 202, and the other sections of Chapter 11 cited by the government, are true bribery statutes; that is, they are *malum in se* statutes which characteristically make the crux of the crime the influence on the recipient in his official capacity. Accordingly, the prosecution must prove intent by the defendants to accomplish undue influence. On the other hand, Sections 217 and 218—and the 1959 version of Section 302—prohibit a transaction between certain parties, irrespective of intent to influence or any other criminal intent.

4. The legislative history of Section 302, as originally enacted in 1947, makes clear that Congress had no intention to prohibit genuine loans by employers to union officers.

Exhaustive research by Appellee has revealed absolutely nothing in the legislative history of Section 302 to indicate any recognition whatever by Congress in 1947 that loans in the labor-management field required regulation. The most conclusive documentation of the foregoing statement is the absence of any citation to the contrary in the Jurisdictional Statement.

In 1959, Congress did turn its attention to loans in the labor-management field. As noted above, Section 302 was amended expressly to make it unlawful for any employer "to pay, *lend,* or deliver" and for any representative "to receive or accept any payment, *loan,* or de[illegible]ery" of, "any money or other thing of value." The words "lend" and "loan" were deliberately and clearly added to Sections 302(a) and 302(b).

By contrast to the 1947 version of Section 302, the legislative history of the 1959 version of Section 302 does show direct Congressional attention to loans. The Congressional committee reports frankly acknowledge that the 1947 version of Section 302 failed to cover many areas in the labor-management field which Congress in 1959 undertook to regulate. The inadequacies in the 1947 version were frequently called ambiguities and "loopholes". For example, Senate Report No. 187, dated April 14, 1959, on S. 1555 ("Kennedy Bill"), reads:

> "Although these provisions of existing law [§ 302] punish *most* forms of *bribery* or *extortion* if they were vigorously enforced by prosecuting officers, the testimony before the McClellan committee revealed *loopholes* which both employer representatives and union officials turned to advantage at the expense of employees. *The committee bill pro-*

poses to close the loopholes. * * *" (p. 13; emphasis supplied.)

Not only did the testimony reveal "loopholes", but Senator Kennedy[13] and Senator McClellan[14] both expressed the opinion that loans generally, and indeed the very loan in issue in this case, were *not* prohibited by the 1947 version of Section 302, and consequently that amendatory legislation was needed.[15]

The Government has selected from Senate and House committee reports the following language:

> "The purpose of these amendments to Section 302 is to forbid any payment, loan, or bribe by an employer, employer association or anyone acting on an employer's behalf, i.e., labor relations consultant. The demand or acceptance of such payment, loan or bribe is also proscribed." (Jurisdictional Statement, at p. 10).

All the reports cited by the government are to this effect. From that language, the government draws the inference that Congress was concerned with expanding the class of persons to whom Section 302 would apply, to include middle-men and trade associations, but that Congress was not concerned with the class of transactions which would be prohibited. We agree that Congress expanded the class of persons to whom Section 302 would apply. However, we fail to see any logic whatever in the government's contention that Congress was not equally concerned with expanding the class of transactions. One inference simply

---

[13]Senator John F. Kennedy sponsored the Senate bill which was incorporated into the final 1959 amendment to the Taft-Hartley Act.

[14]Senator John McClellan served as Chairman of the Senate Select Committee on Improper Activities in the Labor or Management Field, 85th Cong., 1st Sess., before which Committee the testimony was taken.

[15]See Hearings before "McClellan Committee", Part 7, pp. 2253-4, 2376, 2402 (1957).

does not exclude the other. The specific amendments are several, and each is entitled to respect by the Courts.

Of course, it is for Congress to determine that loans, as well as outright gifts, are so injurious to labor relations that they should be prohibited and penalized. But such determination is not self-evident, and was surely not expressed in Section 302 as enacted in 1947. The special and emphatic addition of "loans" to Section 302 in 1959, and the frank recognition of the ambiguity or "loophole" which the sponsors and draftsmen sought to clarify or "plug" by that addition of "loans" to Section 302, amount to a legislative interpretation that loans are *not* prohibited by the 1947 version of Section 302. This, too, invokes a cardinal principle of statutory construction: A legislative amendment which covers a "loophole", is conclusive proof that the earlier statute should be construed *differently* from the later statute. Let it suffice to quote Mr. Justice Butler in Brewster v. Gage, 280 U. S. 327, 50 S. Ct. 115, 74 L. ed. 457 (1930):

> "* * * the deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended. Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears." 280 U. S. at 337.

See also United States v. McClure, 305 U. S. 472, 59 S. Ct. 335, 83 L. ed. 296 (1939); Pierce v. United States, 314 U. S. 306, 62 S. Ct. 237, 86 L. ed. 226 (1941).

The hearings before the Senate Select Committee show conclusively that one of the transactions between employer and employee representative which required the attention of Congress was a loan transaction not included in the Labor-Management Relations Act of 1947. This type of loan transaction is now—and for the first time—within the proscription of federal labor-management legislation. The

loan transaction involved in the case at bar was not prohibited in 1954 when it occurred.

The dismissal of this indictment does not create a "loophole"; for the "loophole" was already there. The dismissal of the indictment does not create any dangerous judicial precedent; for the "loophole" has already been "plugged" by Congress.

* * *

For the foregoing reasons, the motion to affirm should be granted.

Respectfully submitted,

CHARLES SELIGSON
Counsel for
Fruehauf Trailer Co.,
Appellee
350 Fifth Avenue
New York 1, New York

Of Counsel:

ALBERT I. SCHMALHOLZ
MELVIN LLOYD ROBBINS